U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 April 2007

CASE NO.: 2006-LDA-64

OWCP NO.: 02-134530

IN THE MATTER OF:

C. F.[1]

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.
For The Claimant

MICHAEL D. MURPHY, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

(herein the Act), brought by Claimant against Service Employees International (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on July 26, 2006, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 25 exhibits, Employer/Carrier proffered 18 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on November 11, 2003.

2. That Claimant's knee injury occurred during the course and scope of his employment with Employer from the zone of special danger.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on November 12, 2003.

5. That Employer/Carrier filed a Notice of Controversion on February 13, 2004.

6. That an informal conference before the District Director was held on March 6, 2006.

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits from November 23, 2003 to December 13, 2003 at a compensation rate of $600.00 for three weeks. Claimant is also entitled to temporary total disability benefits from January 4, 2004 through January 3, 2005. (Tr. 8).

8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES[3]

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether Claimant has reached maximum medical improvement.

3. Claimant's average weekly wage.

4. Whether Claimant sustained a loss of wage earning capacity.

5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at hearing and provided a recorded statement to Employer/Carrier on December 8, 2003. (EX-9). Claimant graduated from high school and attended two years of college. He has worked as a truck driver and also worked as a correctional officer for the State of Texas for ten years. (Tr. 19-20).

He deployed to Kuwait in August 2003, where he was housed at Camp Arifjan. He drove a heavy transport into Iraq. (Tr. 20). On November 11, 2003, he was performing preventative

[3] In post-hearing brief, Employer/Carrier withdrew the issue of Claimant's entitlement to temporary total disability compensation benefits from January 4, 2005 to January 17, 2005.

maintenance under a trailer when he hit his right knee on the undercarriage. He completed an incident report for his Employer and went to the medic the following day because of pain. (Tr. 21; CX-4). He was given Ibuprofen for pain and the doctor ran a series of tests. Claimant was placed on light duty and was told to return for follow-up. He eventually returned to the United States on November 28, 2003. He was paid three weeks of disability compensation. (Tr. 22).

Upon his return, he sought medical care at the emergency room of Methodist Hospital because of swelling and soreness. The treating doctors assured Claimant that the swelling would go down. He then made a decision to return to Iraq for work in December 2003. (Tr. 23). He worked only a couple of weeks because he "was still hurting," and was placed on light duty doing paperwork and scheduling. He was unable to do his truck driving work. The military doctors told him he had to return to the United States because he was no longer an asset. He arrived back in the United States on January 2, 2004. (Tr. 24).

Claimant treated with Dr. Raji, an internist, upon his return because his left and right knees were swollen and painful and right wrist was in pain. (Tr. 24-25). Dr. Raji informed him that the knee trauma set off a psuedogout syndrome or a release of crystals in the joints. Dr. Raji prescribed medications and did an MRI. (Tr. 25). The treatment was denied by Carrier. (Tr. 26).

About one and one-half years later, Claimant was sent to Dr. Garber, an endocrinologist. He requested treatment from Dr. Bryan, who also examined Claimant. Dr. Garber agreed with the recommended treatment suggested by Dr. Raji of therapy and treatment for "CPPD." (Tr. 27-28). The Carrier refused to pay for therapy until recently. (Tr. 28).

Claimant returned to work on January 17, 2005, as a new home code inspector, which is light work. (Tr. 28-29). He is a contract laborer as an inspector and did not apply for any other jobs because he knew his limitations. (Tr. 29, 32). He testified that he still has pain in his knees and right ankle which would be a problem with driving a truck. He stated he did not know if he could push the clutch in or throw chains to secure the loads. (Tr. 29). His gross earnings per week are between $300-$400. He acknowledged that he earned $21,397.19 before his injury while working in Iraq. (Tr. 30; CX-11).

Claimant stated he thought he drank enough water during his employment in Iraq to keep hydrated. (Tr. 31).

On cross-examination, Claimant acknowledged that he was hired by Employer on August 17, 2003, and was separated from employment on January 3, 2004. (Tr. 33). Claimant denied contacting Dr. Garber about physical therapy recommendations. (Tr. 34). He confirmed that for the five-year period before going overseas with Employer he made a living driving trucks. (Tr. 35). He worked seven days a week while overseas, but not while driving trucks before his employment with Employer. (Tr. 36-37).

Claimant affirmed that he hit his right knee when he sustained his injury and did not hurt any other part of his body. (Tr. 37). He was informed by Dr. Bryan that he thought Claimant's right knee was essentially normal. (Tr. 43).

Claimant's Wife

Claimant's wife testified that Claimant had never had any health issues before going to Iraq. (Tr. 44). He had never had any swelling or pain in his ankles or knees. (Tr. 45). She stated that Claimant cannot kneel, carry any normal weights or do maintenance on his vehicle because of pain in his knee. (Tr. 46). Claimant's wrist has resolved, but his knees are a problem and his ankle swells occasionally. (Tr. 47).

The Medical Evidence

On November 12, 2003, Claimant was examined at the Employer's clinic complaining of pain and swelling to his right knee after hitting his knee on a trailer. A sprain/strain of the right knee was the impression for which ice, ibuprofen and elevation were prescribed. Claimant was placed on light weight bearing. (CX-1, p. 2). On November 14, 2003, Claimant returned to clinic with decreased swelling and good range of motion. He was placed on restricted duty for seven days. ((CX-1, p. 4).

On November 25, 2003, Claimant returned to the clinic for follow-up complaining also of right ankle swelling which began five days before. Claimant denied any injury to his ankle. He was referred to the "Arifjan TMC" for treatment options. (CX-1, p. 6). At the military clinic it was observed that Claimant had developed lower calf and ankle edema with tenderness. (CX-1, p. 7). A doppler study for deep venous thrombosis was normal. (CX-1, p. 9).

On November 28, 2003, Claimant returned to the United States and presented to the emergency room at Methodist Hospital in Houston, Texas, with a chief complaint of right knee pain. (CX-1, pp. 12, 14). He was prescribed Celebrex and Vicodin and referred to Dr. Nixon and an internist or rheumatologist. (CX-1, p. 24). On December 1, 2003, Claimant was diagnosed with "contusion to the knee" and knee pain by Dr. Richard Nixon and was allowed to return to work without restrictions. Claimant was informed that the symptoms should improve over the next few weeks. (CX-1, pp. 25-26). On December 2, 2003, Claimant was "cleared" for duty in Kuwait/Iraq. (CX-1, pp. 27, 29).

On December 11, 2003, Claimant presented at the International Clinic, Salem Al-Mubarak St. Salmia, Kuwait with pain and swelling of the right knee. He was placed on restricted duty for 15 days with no stooping, bending, kneeling, climbing or use of the right lower extremity. He was also prescribed Bextra. (CX-1, p. 33). Claimant was returned to the United States after his restricted duty.

On January 8, 2004, Claimant presented to Dr. Muhammad Rahi, an Internist whose credentials are not of record, for right knee pain and general swelling and complaints of left knee and right ankle pain. On physical examination, Claimant's right knee was tender but not swollen, his left knee had minimal swelling and tenderness. (CX-1, p. 38). X-rays were interpreted as showing a large osteophyte involving the lateral femoral condyle of the right knee but otherwise the findings were consistent with degenerative changes of the right knee. (CX-1, p. 34). Dr. Rahi diagnosed Claimant with "Gout, unspecified vs. pseudogout." (CX-1, p. 41). On January 11, 2004, an MRI revealed a moderate size joint effusion present, evidence of posterior synovial cyst, cruciates and ligaments intact and chondromalacia patella. (CX-1, p. 42).

On January 22, 2004, Claimant underwent an upper gastrointestinal endoscopy and colonoscopy which appears unrelated to his alleged work-related injury. (CX-1, p. 53).

On January 29, 2004, Dr. Rahi opined that he was treating Claimant for a "crystalline deposition disease that most likely was precipitated after he sustained an injury to his right knee." His opinion is based on a "detailed history and physical examination and subsequent work-up and response to some medication." (CX-1, p. 66). On February 12, 2004, Dr. Rahi explained that gout is a metabolic disorder of purine metabolism

characterized by hyperuricemia and recurring attacks of arthritis. He stated that gout and CPPD (calcium pyrophosphate dihidrate crystals) can co-exist. CPPD crystals are deposited in cartilage where they are associated with degenerative changes. He noted that Claimant had shown response to his condition with medication. (CX-1, p. 68). On February 12, 2004, Dr. Rahi again examined Claimant who reported pain episodes daily which were worse with activity. Range of motion at the right knee and ankle caused pain and discomfort. Dr. Rahi instructed Claimant to discontinue the use of Bextra. (CX-1, pp. 71-72).

Dr. John M. Mendez

Dr. Mendez, who is board-certified in internal medicine and preventive medicine and its sub-specialty of occupational medicine, prepared reports based on the medical records of Claimant on February 26, 2004, May 24, 2004, and June 15, 2004, at the behest of Employer/Carrier. (CX-1, pp. 74-78; CX-1, pp. 84-87; EX-5). He was deposed by the parties on June 23, 2006. (EX-14). He did not examine Claimant, but reviewed his medical records. (EX-14, p. 7).

He testified that an x-ray is a tool used to diagnose arthritis or rheumatological conditions and can provide evidence if an individual has pseudogout. If pseudogout was present on x-ray, the radiologist would discuss "chondrocalcinosis," a deposition of calcium or calcification in cartilage. An osteophyte is not the same as a deposit of calcium. (EX-14, p. 9). Dr. Mendez opined that the diagnosis of CPPD was not established because the x-ray did not show deposition of crystals and the only other way to establish such a diagnosis is by extracting fluid from the knee, which was not done. (EX-14, p. 10). He further opined that if Claimant has the condition of pseudogout, his work trauma did not cause the condition. (EX-14, p. 11).

Dr. Mendez also opined that Claimant's use of Bextra would not cause or aggravate gout or pseudogout since the medication does not cause the production of crystals in joints and is used to treat such conditions. (EX-14, pp. 12-13). He opined that trauma may temporarily trigger an attack of pre-existing gout or pseudogout, but could not trigger or make worse an underlying condition on a chronic basis. However, he further stated that the work trauma did not cause either or both conditions. (EX-14, p. 15). He interpreted a lab report of May 12, 2004, which

shows a sedimentation rate of 12 as "perfectly normal" on a scale of 0-20 and reflective of the lack of appearance of inflammation. (EX-14, pp. 16-17).

Dr. Mendez agreed with Dr. Garber's opinion that Claimant's testing revealed no evidence of "tophaceous," or diagnostic findings indicating true gout. (EX-14, pp. 19-20). He also agreed with Dr. Garber that Claimant most likely has crystalline-induced arthritis of the pseudogout variety or possible pseudogout rather than gout. (EX-14, p. 21). He agreed with Dr. Garber's opinion that Claimant's acute pseudogout attack had essentially resolved by April 20, 2005, based on laboratory testing of the sedimentation rate as early as May 20, 2004. (EX-14, pp. 22-23). Dr. Mendez opined that Claimant's ongoing complaints in parts of his body other than his right leg are not related to his acute attack of pseudogout which had resolved by May 20, 2004, and were not permanently aggravated thereby. (EX-14, pp. 23-24). Based on his study of the medical literature and his expertise, Dr. Mendez opined that there is no known mechanism whereby trauma to the right knee can later be responsible for crystal deposits in other extremities. (EX-14, p. 24).

Dr. Mendez opined that the best diagnostic test to determine pseudogout is the x-ray which would reveal the presence of calcium in the cartilage, called chondrocalcinosis. (EX-14, p. 24). He opined that Claimant's traumatic injury resolved by May 20, 2004. He further opined that Claimant had an underlying disease before his traumatic injury which was temporarily "lit up" by the trauma, but that the trauma is no longer the cause of his current problems, whether in his wrist or any other joint. (EX-14, p. 25).

Dr. William Bryan

On September 1, 2004, Claimant presented to Dr. Bryan, an orthopedic surgeon, with complaints of pain in the left and right knees, right wrist and right ankle. (CX-1, p. 89). Claimant reported difficulty with his right knee and other joints since his injury on November 11, 2003, and that the trauma may have triggered gout or CPPD. Claimant reported his knee pain had decreased, but he was unable to work because increased activity increases knee pain. Dr. Bryan noted that Claimant's MRI revealed no structural abnormalities of the right knee.

Dr. Bryan opined that Claimant had an essentially normal appearing right knee on physical examination with slight medial joint line tenderness. He assured Claimant that his "various arthralgias and increased sedimentations rate speak for an autoimmune disease" and recommended he see a rheumatologist or immunology expert. He concluded that there was "absolutely no reason why this gentleman needs his right knee arthroscoped." (CX1, p. 88; EX-6).

Dr. Alan Garber

Dr. Garber, who specializes in Endocrinology and is not board-certified, examined Claimant at the behest of Employer/Carrier on February 28, 2005, and rendered a report date April 20, 2005. (CX-1, pp. 97-103; EX-7). He was deposed by the parties on July 18, 2006. (EX-13). His medical practice focuses on diabetes and lipids. He testified gout is a clinical consequence of chronically elevated uric acid levels which is a concomitant condition of diabetes. (EX-13, p. 7).

Dr. Garber opined that there is no reasonable medical probability by which to connect Claimant's injury to his right knee to any other distant acute or chronic issue arising from or connected with gout or pseudogout. (EX-13, pp. 9-10). Excluding a consideration of Claimant's right knee injury, he did not connect any permanent medical condition to Claimant's working environment overseas or dehydration. (EX-13, p. 11). Dr. Garber testified that CPPD is a condition much like gout which results in symptoms of an inflammatory process. The sedimentation rate is a measure of inflammation from which the degree or severity of infection can be measured. (EX-13, pp. 12-14).

Dr. Garber noted that when he examined Claimant in February 2005 his joints were not inflamed or swollen and there was no evidence of arthritis. (EX-13, pp. 15-16). Dr. Garber opined that using the sedimentation rate as a marker for inflammation was an indirect approach in determining whether the crystal-induced inflammation had remitted. He opined that an examination of the joints was a more direct approach. (EX-13, pp. 17-18). However, he opined that within reasonable medical probability, it was more likely than not that there was no significant degree of inflammation when Claimant measured a sedimentation rate of 12 on May 12, 2004. (EX-13, p. 20). Although the inflammation process had remitted in February 2005

when Dr. Garber examined Claimant, he recommended that Claimant undergo rehabilitation with physical therapy and re-training. ((EX-7, p. 4). He deposed that Dr. West would be his choice of physical therapists. (EX-13, p. 21).

Dr. Garber further opined that Bextra, taken from November 12, 2003 to December 12, 2003, could not within reasonable medical probability be responsible for any of Claimant's adverse physical effects. Bextra was approved by the FDA as an anti-inflammatory agent for relief of symptoms of arthritis. (EX-13, p. 22).

He disagreed with Dr. Mendez's opinion that x-rays were the best method to determine CPPD. He preferred to aspirate the joint fluid to determine the type of "offending crystals" present, whether uric acid or calcium pyrophosphate. He stated the presence of crystals may not be seen on x-rays, unless there is enough to absorb x-rays and produce a "spot on the x-ray." (EX-13, pp. 23, 25). He opined that the presence of an osteophyte on x-ray usually means the presence of osteoarthritis such as the x-rays taken on January 8, 2004. (EX-13, p. 25). He noted that Claimant had no radiological evidence of tophaceous change, or deposition of solid uric acid crystals, which would have been a classic interpretation of gouty arthritis. (EX-13, p. 26).

He agreed with Dr. Mendez's opinion that Claimant's complaints in other extremities other than the right knee were not related to his pseudogout condition. He opined that individuals with calcium or uric acid deposition are usually overweight, dysmetabolic, and insulin resistant. (EX-13, p. 27).

On physical examination, Dr. Garber found Claimant to be overweight and hypertensive with an absence of joint effusion or swelling and no evidence of tophus deposition or joint pain or tenderness on palpation. (EX-13, p. 29). He opined it would not be a surprise to determine that Claimant had elevated uric acid levels or clinical gout since he was at greater risk to have such a condition. An absence of effusion of the joints was significant since it revealed no evidence of arthritis, the temporary condition of CPDD had passed and Claimant had no active disease. (EX-13, pp. 30-31). No evidence of tophaceous change signified no evidence of chronic past disease related to gout. Dr. Garber did not aspirate Claimant's joints because there was no excess fluid to aspirate. (EX-13, p. 31).

Dr. Garber reported that he recommended physical therapy because Claimant had a limitation on range of motion, but no evidence of acute inflammation. (EX-13, p. 32). He further opined that Bextra was in no way linked to Claimant's condition. He opined that pseudogout was an intermittent inflammatory process and was not a permanent condition. He concluded Claimant generated a considerable inflammatory response which had remitted and had no evidence of active gout or pseudogout. (EX-13, p. 33).

Dr. Garber further opined that given Claimant's limitation of motion of his knee, it would have been difficult but not impossible for him to conduct most activities of daily living. Physical therapy would improve Claimant's pain and functioning level of his knee. (EX-13, pp. 38-39).

Dr. Garber testified that Claimant is not more susceptible to recurrence of pseudogout by having it, but he was at risk for recurrence. (EX-13, p. 40). He stated that joint trauma can precipitate crystal-induced arthritis and aggravating circumstances of dehydration overseas and in the United States likely "conspired to produce a relatively prolonged illness." (EX-13, p. 41). He opined that Claimant may never have a problem with pseudogout and the likelihood of him having another attack is not influenced by the number of his prior attacks. (EX-13, p. 43). He agreed that the susceptibility of another attack is similar to asthma as a chronic condition, both of which require a provocative stimuli to get an acute clinical problem. (EX-13, p. 44). If Claimant remains hydrated, he will do fine in Dr. Garber's opinion. (EX-13, p. 45). Claimant's consumption of alcohol and milk affects his level of hydration according to Dr. Garber. (EX-13, p. 46).

The Vocational Evidence

On June 21, 2006, Wallace Stanfill, a certified rehabilitation counselor, interviewed Claimant at the request of Employer/Carrier for purposes of conducting a vocational rehabilitation assessment. On July 5, 2006, Mr. Stanfill rendered a vocational report. (EX-11). Claimant informed Mr. Stanfill that he experienced constant nagging right knee, ankle and wrist pain which is exacerbated with any increased physical activity. Claimant estimated he could safety lift 30-40 pounds, stand for 15-20 minutes, sit for 1/2 hour, and drive for approximately 1 and 1/2 hours. He was taking no prescription medications and was not receiving any active medical care or therapies.

Vocationally, Claimant reported working as a commercial truck driver for five years before his employment with Employer. He was a correctional officer for ten years before beginning his vocation as a truck driver. (EX-11, p. 4). Claimant had not sought or registered for rehabilitation services with the State of Texas or the U. S. Department of Labor. (EX-11, p. 5).

Claimant informed Mr. Stanfill that because of his knee and hand symptoms and pain he was restricted to light-duty occupations only. (EX-11, p. 6). Mr. Stanfill reported that drivers of light trucks earned $32,037.00 per year based on data available from the Texas Workforce Commission.

Consistent with Claimant's self-described limitations, Mr. Stanfill completed a labor market survey which revealed ten jobs available in various categories, including driving positions, which paid between $9.50 and $10.00 per hour. (EX-11, pp. 6-8).

In addition to the foregoing vocational information, Claimant testified that he returned to employment as a new home code inspector on January 17, 2005, which he considers light work and less demanding than his former work with Employer overseas. Claimant testified that his gross average earnings are $400.00 per week.

The Contentions of the Parties

Claimant contends he returned to work on January 17, 2005, at which time he had a reduction in his earnings and a loss of wage earning capacity. He claims he sustained a knee injury and work-related "psuedogout" while working in Iraq. The psuedogout is alleged to be related to dehydration caused from his work environment. Claimant argues his average weekly wage should be computed under Section 10(c) of the Act based on his rate of pay while employed in Iraq.

Employer/Carrier rely upon the opinions of Drs. Garber and Mendez that the psuedogout condition is temporary and not permanent and to the extent Claimant suffers any kind of joint problems in other than the right knee, it is not related to the dehydration alleged. Employer/Carrier argue that Claimant sustained a scheduled injury and there is no credible evidence that he has a general loss of wage earning capacity. Employer/Carrier contend that Claimant's average weekly wage should be computed based upon his pre-Iraq truck driver earnings and his Iraq earnings under Section 10(c) of the Act. They

further assert that it is unreasonable to use the rate of pay or contract rate to calculate average weekly wage since the retention rate for truck drivers was on a steady decline during the contract year.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216

(2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Based on the stipulations of the parties, I find and conclude that Claimant sustained an injury to his right knee on November 11, 2003, while in the course and scope of his employment with Employer.

Claimant also contends that his pseudogout condition is work-related. Dr. Rahi offered a medical opinion that the CPDD condition was most likely precipitated after Claimant sustained

his right knee injury. Dr. Garber also opined that Claimant's knee trauma **could** precipitate crystal-induced arthritis and dehydration **could** have aggravated the circumstances.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on November 11, 2003, and that his working conditions and activities on that date could have caused or precipitated his pseudogout condition and the harm or pain complained of which is sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

"Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence.")

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

I find that Employer/Carrier have presented evidence rebutting the Section 20(a) presumption from Drs. Mendez and Garber. Dr. Mendez opined that the diagnosis of CPPD was never established by Dr. Rahi because of the absence of radiographic evidence of the deposition of crystals. He further opined that Claimant's work trauma did not cause his pseudogout condition. Dr. Garber opined that there was no reasonable medical probability of a connection between Claimant's knee injury and any other acute or chronic issue arising from or connected with pseudogout and did not connect any permanent medical condition to Claimant's working environment overseas or dehydration.

3. Weighing All the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

The medical evidence establishes that Claimant suffered a sprain/strain to his right knee on November 11, 2003. Three days later his swelling had decreased and he had good range of motion of his right knee. He was placed on restricted duty for seven days. Two weeks after his right knee injury, he developed swelling in the right ankle and lower calf. He denied any further injury. On December 1, 2003, Dr. Nixon diagnosed a contusion of the knee and released Claimant to his usual truck driving duties without restrictions and Claimant returned to Kuwait/Iraq.

After returning overseas, Claimant was restricted in the use of his right lower extremity for 15 days with limitations on stooping, bending, kneeling and climbing. There is no other evidence of any restrictions placed on Claimant by any medical providers upon his return to the United States.

The record clearly establishes that there is no structural abnormality to Claimant's right knee, which Dr. Bryan viewed as essentially normal appearing. Dr. Bryan further opined that there was no need for surgery. Orthopedically, on September 1, 2004, Dr. Bryan placed no restrictions, limitations or impairment ratings on Claimant. Dr. Mendez opined that Claimant's traumatic injury had resolved by May 12, 2004. However, contrary to Dr. Mendez, Dr. Garber recommended physical therapy for Claimant's knee to improve his pain and functioning level, which was never approved.

Despite the opinion of Dr. Rahi, Dr. Mendez disputed the findings of gout or pseudogout because of a lack of proper testing. Dr. Rahi's diagnosis is based on Claimant's history and physical exam, "subsequent work-up" and response to medications. His diagnosis is not otherwise explained or rationalized.

I find the opinions of Drs. Mendez and Garber to be more reasoned and probative of Claimant's alleged pseudogout condition. Dr. Mendez explained that if pseudogout was present on x-ray, which is the only test used by Dr. Rahi, the radiologist would have referred to a deposition of calcium or calcification in cartilage which was not mentioned. Thus, according to Dr. Mendez, the diagnosis of CPPD was not established. He further opined that Claimant's work trauma did not cause his gout or pseudogout condition. He also noted that

trauma may temporarily trigger an attack of pre-existing gout or pseudogout, but it could not make an underlying condition worse on a chronic basis. By May 12, 2004, he opined Claimant's temporary pseudogout condition had resolved based on his normal sedimentation rate reading.

Dr. Garber opined within reasonable medical probability that there was no connection between Claimant's right knee injury and his other distant acute or chronic issue from gout or pseudogout. In February 2005, Claimant's joints were not inflamed or swollen and there was no evidence of arthritis. He agreed with Dr. Mendez that by May 12, 2004, it was more likely than not that there was no significant degree of inflammation present when Claimant measured a sedimentation rate of 12. Furthermore, Dr. Garber opined that there was no radiological evidence of a tophaceous change on x-ray, or deposition of crystals, which would have been a classic interpretation of gouty arthritis. He also agreed with Dr. Mendez that Claimant's complaints in other extremities were not related to his traumatic injury.

Drs. Mendez and Garber agreed that a pseudogout condition is temporary and may cause an intermittent inflammatory process. Dr. Garber attributed Claimant's pseudogout symptomatology to a pre-disposition, or being at a greater risk, for such a condition because of being overweight and hypertensive. Although Dr. Garber opined that joint trauma can precipitate crystal-induced arthritis, the record is devoid of any objective evidence that Claimant suffers from such a condition, i.e. crystal-induced arthritis.

In view of the foregoing, I find that Claimant suffered a sprain/strain of his right knee for which Employer/Carrier are responsible. I further find that the probative medical opinions of record establish Claimant does not have a permanent pseudogout condition, but that he may have suffered a temporary pseudogout condition after his traumatic injury, which was not related to his right knee injury, and which resolved by May 12, 2004, based on his normal sedimentation rate. I find and conclude that Employer/Carrier are not responsible for Claimant's continuing pseudogout condition.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable right knee injury and a temporary pseudogout condition, the burden of

proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific

Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Based on the foregoing, I find and conclude that Claimant was temporarily totally disabled from November 23, 2003 to December 23, 2003, and from January 4, 2004 to January 16, 2005, and is entitled to temporary total disability compensation benefits based on his average weekly wage of $1,741.02, as computed hereinafter. I so find based on Claimant's self-professed and uncontradicted limitations on driving a truck and the attendant activities associated therewith, which precluded his return to his former job with Employer. I further find that Claimant is entitled to temporary partial disability compensation benefits from January 17, 2005, and continuing based on two-thirds of the difference between his average weekly wage of $1,741.02 and his residual wage earning capacity of $400.00 per week.

Because Claimant was entitled to physical therapy for his right knee as recommended by Dr. Garber, which was never provided by Employer/Carrier, and which was clearly a medical necessity to improve pain and functioning level for his work-related right knee injury, Claimant continued to be temporarily disabled after May 12, 2004, and beyond January 17, 2005. Since Claimant was precluded from performing his former employment, he is considered totally disabled. I find and conclude he remains temporarily disabled because he has not been provided necessary physical therapy and thus has not reached maximum medical improvement. Accordingly, his right knee injury is not deemed a permanent partial disability or a scheduled injury under Section 8(c) of the Act.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge

to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

Claimant has not been limited or restricted by any medical professional from performing work activities. Dr. Bryan, the only orthopedist to render an opinion in this matter, placed no restrictions on Claimant's ability to work. Nor has Drs. Rahi, Mendez or Garber. The only limitations of record are the self-

limitations of light-duty work advanced by Claimant to Mr. Stanfill which are uncontradicted and the necessity for physical therapy.

Mr. Stanfill identified ten alternative employment positions in various categories which averaged $10.00 per hour. Claimant located a job as a new home code inspector which also pays $400.00 per week on average. I find the position which Claimant filled on January 17, 2005, to be suitable employment. Thus, Claimant has established a loss in weekly wage earning capacity.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings. Claimant is neither a five-day nor six-day per week worker since he worked seven days per week while employed by Employer. There is no record evidence of earnings by similarly situated employees.

Claimant worked as a heavy truck driver for approximately 12 weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

In Miranda v. Excavation Construction Inc., 13 BRBS 882, 886 (1981), the Board held that a worker's average weekly wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the **wages at the employment where he was injured** would best adequately reflect the Claimant's earning capacity **at the time of his injury.**

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

I find that during his 12 and 2/7 weeks of employment before his injury, Claimant earned $21,397.19. (CX-11; EX-18). Claimant argues his average weekly wage should be based on his contract rate, which would yield an average weekly wage of $1,759.74 ($21,627.21 ÷ 12.29 weeks).

Contrary to Claimant's argument, Employer/Carrier presented documentary evidence that of the 328 similarly situated employees hired under the LOGCAP III program during the eight months before Claimant's injury, only 100 remained as of the date of his injury. (EX-15). Employer/Carrier argue that because of the significant attrition rate, Claimant's average weekly wage should be based on a blend of his domestic and overseas earnings, and not solely on his contract rate, yielding a weekly wage of $505.79 under Section 10(c) of the Act. Employer/Carrier contend that because of the attrition rate for Claimant's specific job at the specific time in question, it would be unreasonable to utilize the contract rate of hire as the sole basis upon which to determine average weekly wage as was accomplished in Zimmerman v. Service Employers International, 39 BRBS 166 (ALJ), aff'd BRB No. 05-0580 (February 22, 2006)(unpublished).

Employer/Carrier urge a finding that Claimant earned $21,397.19 from August 17, 2003 to the date of his accident, November 11, 2003, for a period of 12 and 2/7 weeks. They would add Claimant's overseas earnings to his pre-deployment 2003 earnings of $4,903.70 and divide by 52 weeks yielding an average weekly wage of $505.79.

In Zimmerman, it was similarly argued that a blend of domestic and overseas wages should be used to compute claimant's average weekly wage. The ALJ in Zimmerman concluded that the truck driving duties performed by Zimmerman in the United States failed to represent work of the same nature and type that he performed at the time of his injury while employed in Kuwait. Consequently, he concluded Section 10(a) should not be used to calculate average weekly wage. It was further concluded that to consider claimant's state-side earnings prior to his injury, even under Section 10(c) of the Act, would reflect a lower paying wage that would be unfair to claimant.

In the instant case, Claimant faced the same war hazards as in Zimmerman which are not representative of the working conditions he experienced while driving a truck in the United States. Therefore, I find the wages earned by Claimant at the time of his work injury are most representative of his earnings potential and capacity. Accordingly, I find and conclude that Claimant's average weekly wage is $1,741.02 ($21,397.19 ÷ 12.29).[4]

Although Employer/Carrier's argument regarding attrition of drivers and its affect on the likelihood of Claimant continuing to work in a Kuwait/Iraq truck driving position is an appealing one, it is essentially prospective in nature. It provides a statistical analysis in assessing how long Claimant may have continued to work in Kuwait absent injury. I find it is not helpful in a determination of average weekly wage which should be computed on earnings prior to or at the time of injury.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

[4] Under Section 6(b)(1) disability compensation shall not exceed an amount equal to 200 percent of the applicable national average weekly wage. The maximum rate of compensation in effect at the time of Claimant's injury of November 11, 2003, is $1,030.78. (See http://www.dol.gov/esa/owcp/lhwca/NAWWinfo.htm).

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Having found that Claimant sustained a right knee injury, and a temporary pseudogout condition which has resolved, he is entitled to and Employer/Carrier are responsible for reasonable and necessary medical care, to include physical therapy as recommended by Dr. Garber.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer was notified of Claimant's injury on November 12, 2003. Claimant was paid benefits from November 23, 2003 to December 23, 2003. After his return to Kuwait in December 2003, he return to the United States on January 2, 2004, but compensation was not resumed. Employer/Carrier filed a notice of controversion on February 13, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[5] Thus, Employer timely initiated compensation on November 23, 2003, but was liable for the resumption of Claimant's total disability compensation payment on January 16, 2004. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by January 30, 2004, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on January 30, 2004, and is liable for Section 14(e) penalties from January 16, 2004 until February 13, 2004, when a notice of controversion was filed.

[5] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[6] A

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[6] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate.

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from November 13, 2003 to December 23, 2003, and from January 4, 2004 through January 16, 2005, based on Claimant's average weekly wage of $1,741.02, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for temporary partial disability from January 17, 2005 and continuing, based on two-thirds of the difference between Claimant's average weekly wage of $1,741.02 and his reduced weekly earning capacity of $400.00, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November 11, 2003, work injury to his right knee, pursuant to the provisions of Section 7 of the Act, including physical therapy consistent with this Decision and Order.

4. Employer/Carrier shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to February 13, 2004, as provided herein, exceed the sums which were actually paid to Claimant.

5. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 28, 2006**, the date this matter was referred from the District Director.

6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 27th day of April, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge